

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	19-CR-00286(AMD)
	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
	:	Wednesday, September 28, 2022
ROBERT SYLVESTER KELLY,	:	11:00 a.m.
	:	
Defendant.	:	

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TRANSCRIPT OF CRIMINAL CAUSE FOR HEARING
BEFORE THE HONORABLE ANN M. DONNELLY
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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1 (In open court.)

2 THE COURTROOM DEPUTY: All rise.

3 (Judge ANN M. DONNELLY entered the courtroom.)

4 (Defendant present via videoconference.)

5 THE COURT: Hi, everybody can have a seat.

6 THE COURTROOM DEPUTY: This is criminal cause for a
7 hearing, docket number 19-CR-286, USA versus Robert Kelly.

8 Counsel state your appearance, Government first.

9 MS. ELBERT: Good morning, Your Honor.

10 Lauren Elbert for the United States.

11 THE COURT: I am just going to ask you to have a
12 microphone handy so we can hear you.

13 MS. ELBERT: Sure.

14 MS. BONJEAN: Good morning, Your Honor.

15 Jennifer Bonjean and Ashley Cohen on behalf of
16 Mr. Kelly, who is present via Zoom.

17 THE COURT: All right.

18 Good morning.

19 Good morning, Mr. Kelly.

20 THE DEFENDANT: Good morning.

21 THE COURT: Can you hear?

22 THE DEFENDANT: Yes, ma'am, I can hear you.

23 THE COURT: Okay, just to clarify, I think the
24 request that Mr. Kelly appear by Zoom was made by defense
25 counsel because I think he suffered some injury.

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1 Is that right?

2 MS. BONJEAN: Yes, Your Honor. He has, I don't want
3 to get in too much detail, but it would have been
4 uncomfortable. And he, I think, was waiting for some medical
5 services there at the MCC.

6 THE COURT: That's completely fine. I just wanted
7 to establish that it was a defense request and he's consenting
8 to appear by video.

9 Is that right?

10 MS. BONJEAN: That's right, Your Honor.

11 THE COURT: Okay.

12 So, just a little bit of background. When the
13 defendant was sentenced, in addition to the prison sentence, I
14 also ordered a 100-thousand-dollar fine, the \$900 mandatory
15 special assessment, as well as \$40,000 under the Justice For
16 Trafficking Victims Act, but I deferred ruling on the question
17 of restitution until I got further information from the
18 parties.

19 I am going to go over the submissions because there
20 have been quite a few of them, and I just want to make sure I
21 haven't missed anything.

22 At this point, just to recap, and I'll have the
23 Government correct me if I'm wrong, but the restitution
24 requests are for three of the victims. I think I am correct
25 that the only victim for whom restitution is sought pursuant

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1 to U.S.C. Section 2429 is Jane.

2 Is that right?

3 MS. ELBERT: That's right, Your Honor.

4 THE COURT: All right. And the other two victims,
5 restitution is being sought pursuant to 18 U.S.C. 3663(a).

6 So let me just go over the submissions that I've
7 gotten.

8 There was an initial restitution letter from the
9 Government, and I am not going to go into the detail, but it
10 made some requests for Jane Doe Number 5, Sonja, and there was
11 a reference to Jane Doe Number 9.

12 On June 24th, Probation filed a letter in which it
13 stated that Faith and Faith's mother returned victim impact
14 statements and affidavits of loss.

15 There was an objection filed by the defense on June
16 27th.

17 Then on September 9th there was another submission
18 by the Government, this time advising the Court that Kelly
19 withdrew her claim, I don't know which Jane Doe that was, and
20 that the Government was not seeking restitution for Faith, but
21 was continuing to seek restitution for the other victims.

22 On September 21st the defense filed a letter
23 opposing the Government's request.

24 The Government replied on the 23rd.

25 On the 27th, the Government clarified the

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1 calculations with respect to Stephanie and defense counsel
2 filed a response.

3 And at the outset I think there was a typographical
4 error in your submission of the 27th in terms of the years
5 that we're talking about.

6 MS. ELBERT: That's correct, Your Honor.

7 THE COURT: You wrote 2009, but you meant 1999.

8 MS. ELBERT: 1999, that's right, Your Honor.

9 THE COURT: All right.

10 The Government is seeking with respect to Jane Doe
11 Number 5 a total amount of \$357,218.18, which covers herpes
12 treatment expenses, projected therapy expenses for
13 three-and-three-quarters years, and lost income.

14 Restitution for Stephanie for herpes treatment
15 expenses and for, is it three years of therapy expenses?

16 MS. ELBERT: I believe that's right, Your Honor, but
17 let me just double-check.

18 THE COURT: I believe that's correct. I think
19 that's right. If it's not --

20 MS. ELBERT: Yes, I think that's right, Your Honor.

21 THE COURT: -- you'll let me know.

22 MS. ELBERT: Yes.

23 THE COURT: And then for Sonja the request is for
24 \$5,200, and that's for therapy expenses for a year.

25 First of all, have I missed anything? Is there any

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1 submission that I haven't covered?

2 MS. ELBERT: I don't believe so, Your Honor.

3 MS. BONJEAN: No, I believe that's correct.

4 THE COURT: All right.

5 And just sort of some basic principles. With
6 respect to Section 2429 that applies to Mann Act convictions
7 and applies to Jane Doe Number 5. It's mandatory restitution
8 for defendants convicted of Mann Act violations in the full
9 amount of victim's losses.

10 The reimbursements must be for costs that are
11 incurred or reasonably projected to be incurred in the future
12 as a proximate result of offenses involving the victim. And
13 the costs include medical services, including physical,
14 psychiatric or psychological care as relevant here, lost
15 income, and any other relevant losses that the victim incurs.

16 There are some other ones as well, but I don't think
17 they apply here.

18 With respect to the restitution that's covered by
19 3663, Section 3663 of 18 U.S.C., the sentencing court may
20 require restitution if there is bodily injury to a victim.
21 And in those cases, the Court can award restitution to cover
22 the costs of necessary medical and related professional
23 services and devices related to physical, psychiatric and
24 psychological care, including non-medical care and treatment
25 that's rendered in accordance with a method of healing

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1 recognized by the law in the place of treatment.

2 The restitution only has to be a reasonable estimate
3 of the losses, but the Court cannot base a restitution award
4 on speculation. But the law is also clear that any
5 uncertainties with respect to the amount in question must be
6 resolved in the victim's favor because of the statutory focus
7 on making the victim whole.

8 The Government's burden is to establish the loss
9 amount under these statutes, and any dispute about the amount,
10 the Court has to resolve by a preponderance.

11 So, I think the best thing to do here is to start
12 with Jane. And, again, this would be based on the Mann Act
13 violations, in particular, Racketeering Acts 8, 9, 10 and 11
14 under Count One and Counts Two, Three, Four and Five, which
15 charged Mann Act violations based on sexual activity that
16 exposed Jane to herpes, and based on sexual activity with a
17 minor, sexual exploitation of a child, and forced labor.

18 I also think that it is probably, because I think
19 this discussion will come up, is probably not a bad idea to
20 mention that under 18 U.S.C. 3663, what the definition of a
21 victim is. And that's a person who is directly and
22 proximately harmed as a result of the commission of an offense
23 for which restitution may be ordered, including in the case of
24 an offense that involves as an element, a scheme, conspiracy
25 or pattern of criminal activity, any person directly harmed by

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1 the defendant's criminal conduct in the course of the scheme,
2 conspiracy or pattern.

3 Also, Judge Amon, who wrote a very comprehensive
4 opinion on the topic of restitution, observed that the
5 definition of victim is broad.

6 So, let me hear from the Government. I mean I will
7 say that the submissions are pretty thorough, and I think I
8 understand everybody's argument, but the Government's position
9 with respect to the cost, we'll start with treating the
10 herpes, the Government calculates that amount as \$281,168.18.
11 And I think the Government reached that determination by
12 calculating how much it costs a year to take Valtrex without
13 insurance and an annual gynecological exam, which the
14 Government calculates as \$5,255.48, and multiplying that by
15 the average life expectancy for a woman in the United States,
16 which is 82. And so, the Government's multiplied those
17 amounts by 53-and-a-half years.

18 And then citing the website, public website, the
19 Government assumes that a thirty-day supply of 500-gram
20 Valtrex tablets costs \$421.29, and that an annual
21 gynecological exam costs \$200.

22 Do I have those figures correct?

23 MS. ELBERT: Yes, Your Honor.

24 THE COURT: Now, Ms. Bonjean, I understand you to be
25 saying that Jane's herpes isn't causally linked to the Mann

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1 Act violations because there's no connection between her
2 contracting herpes and the encounters in California that are
3 the basis of the Mann Act violations.

4 And so, your position is she's not a victim, is that
5 right?

6 MS. BONJEAN: No, my position --

7 THE COURT: Turn on your microphone, if you could.
8 Thanks.

9 MS. BONJEAN: I think the question of what
10 constitutes a victim is not the same question of whether or
11 not the specific conduct that is the basis of the offense is
12 proximately and directly related to the harm for which the
13 victim is seeking restitution.

14 So, I don't quarrel with the Court or Judge Amon's
15 or anyone's definition of victim. And I think for restitution
16 purposes Jane Doe qualifies as a victim. That doesn't obviate
17 the need to make a proximate and direct causal link to the
18 specific offenses for which the victim is seeking restitution.
19 And that there has to be actual --

20 THE COURT: The only reason I am going to just stop
21 you for a moment --

22 MS. BONJEAN: Yes.

23 THE COURT: -- I just want to make sure I understand
24 that your position is that the Government would have to
25 establish that she actually got herpes from those two

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1 encounters in California?

2 MS. BONJEAN: Yes, for the purposes of certainly
3 under 2429. And then if you were considering it pursuant to
4 18 U.S.C. 3663(a), it would still have to be connected to some
5 criminal activity or pattern of criminal activity.

6 And our position, and it's the uniqueness of the
7 indictment and the uniqueness of the case and the uniqueness
8 of the underlying circumstances of these particular offenses,
9 that yes, they do have to demonstrate that the harm that Jane
10 suffered was causally linked to some specific criminal
11 activity that was either, again, under the Racketeering Act or
12 a Mann Act violation. And the reason for that is, otherwise,
13 we're just saying we may as well just, you know, have a
14 sign-up list at the door for anyone that wants to allege that
15 they were mistreated by Mr. Kelly for, you know, the entirety
16 of the alleged RICO enterprise.

17 THE COURT: Well, I don't think anybody is
18 suggesting that. Maybe I am not making myself clear.

19 I just want to make sure that I understand that your
20 position is that the Government has to specifically connect
21 her actually contracting herpes to those two times in
22 California.

23 Is that right?

24 MS. BONJEAN: Yes, or some other criminal activity
25 as part of the RICO enterprise at a minimum, yes.

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1 THE COURT: Well, because as I understand it, the
2 racketeering acts charged with respect to this victim, the
3 Mann Act offenses were engaging in sexual activity that
4 exposed someone to herpes in violation of public health
5 statutes.

6 MS. BONJEAN: Correct, and they were -- it wasn't --
7 you know, they were together four years. They weren't -- it
8 wasn't every time they had sex he committed a crime.

9 So, yes, I think the specific offense that was
10 charged that was -- for which he was convicted, there has to
11 be that causal link.

12 THE COURT: All I'm saying is the statute doesn't
13 require that she actually contracted, it requires that he
14 exposed her to it.

15 MS. BONJEAN: I know -- well, I know that -- well, I
16 know the Court's -- yes, I am aware what the Court's position
17 is on that, and I'm not even quarreling with that.

18 THE COURT: I just read the statute, that's all.
19 That's what it says.

20 MS. BONJEAN: I understand, but for restitution
21 purposes, for there to be harm, exposure wouldn't be enough.

22 THE COURT: Well, are you disputing that she has it?

23 MS. BONJEAN: No, I'm not disputing she has it. I'm
24 disputing the fact that we don't know when she -- when she was
25 afflicted with it. And we also don't know whether it was

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1 correlated with any criminal activity.

2 And while I understand maybe the Court and the
3 Government believes I'm splitting hairs here, I do think --

4 THE COURT: You don't have to attribute any intent
5 to me.

6 MS. BONJEAN: Yeah, I'm not.

7 THE COURT: I'm not trying to trick you. I'm just
8 asking a question, that's all.

9 MS. BONJEAN: That's our position, yes. I mean I
10 think it is technical and I think that this is not just, you
11 know, the spirit of, you know, whether she is entitled to
12 restitution.

13 I mean people sue for emotional damages and there's
14 other remedies. This is a very specific type of remedial
15 purpose and, yes, our position is that it has to be correlated
16 to a specific activity that was charged in the Mann Act
17 violations, which put particular dates on those things; yes.

18 THE COURT: Okay.

19 Can I hear your response to that?

20 MS. ELBERT: Yes, Your Honor.

21 Obviously, the defendant exposed this victim to
22 herpes multiple times, including on the dates specifically
23 alleged, as well as other dates.

24 The causal link has to be established by a
25 preponderance of the evidence. It's been proven that the

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1 defendant exposed this victim to herpes. She now has herpes
2 and has to incur costs in order to treat that herpes.

3 We submit that the evidence that was presented at
4 trial was sufficient to establish the causal link between the
5 charged conduct and her costs, such that restitution is
6 appropriate.

7 THE COURT: Okay.

8 Is there anything else that you wanted to say about
9 that?

10 MS. BONJEAN: On the specific causal link issue, no.
11 I think the briefing is sufficient.

12 I do think it's an interesting question, and I don't
13 know that it is as well resolved as I would like it to be.
14 But I do -- I think -- I think our papers set forth our
15 position on it.

16 THE COURT: I think so. I think so, too.

17 So, I think this particular question can be analyzed
18 under both restitution statutes. It has to be under 2429.
19 And in connection with making this determination, I,
20 obviously, presided over the trial and referred back to some
21 of the testimony to refresh my recollection about what
22 happened.

23 As I said, the racketeering acts and the Mann Act
24 defenses charged the defendant with engaging in schedule
25 activity that exposed a person to genital herpes in violation

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1 of public health statutes. But the evidence at the trial
2 established, as I recall it and as I reviewed in the
3 transcript, that Jane testified that she contracted genital
4 herpes in the summer of 2015 and that she saw a doctor in 2015
5 and the doctor diagnosed her with herpes and prescribed
6 medication. She told the defendant about this and he told her
7 she could have gotten it from anyone. And she responded that
8 she had only been intimate with him.

9 Medical records that were introduced at the trial
10 also reflect that at that point the defendant was her only
11 sexual partner.

12 Given that testimony and given the actual charges,
13 the Government has satisfied its burden of showing that Jane
14 contracted herpes from the defendant during the encounters
15 that were identified in the Indictment, even though I don't
16 think that's what they had to prove. They had to prove that
17 he exposed her to it.

18 But she would also be entitled to restitution under
19 18 U.S.C. Section 3663. As I said before, a victim includes
20 someone who has been harmed as the result of the commission of
21 an offense, in the case of an offense that involved as an
22 element a scheme, conspiracy or pattern of criminal activity.
23 And someone who's a participant in that kind of a conspiracy
24 or criminal activity can be ordered to pay restitution.

25 And my recollection is that the racketeering, one of

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1 the means and methods was exposing sexual partners without
2 informing them that he had a sexually transmittable disease.

3 Now, there is also a question about the calculations
4 in terms of Valtrex instead of the generic version. I am not
5 aware of any authority, but I will certainly hear from you,
6 Ms. Bonjean, if there is authority that requires a victim that
7 is looking at different courses of treatment to pursue the
8 less expensive option.

9 Do you have anything you want to add to that?

10 MS. BONJEAN: I mean I don't -- I think that kind of
11 mischaracterizes the issue.

12 I don't think it's a matter of pursuing a less
13 expensive treatment. It's the same drug. One is just generic
14 brand, which is what insurance would pay for; and one is an
15 inflated brand version for which the Government has failed to
16 demonstrate any need or any expectation that she would opt for
17 Valtrex, rather than just pocket the quarter-million dollars,
18 which is what would happen. I mean she could go pay \$15 a
19 month for the generic brand, and then she would be left with
20 over 200-thousand dollars for -- I mean that's what we're
21 talking about here. So, that's the concern.

22 THE COURT: What's your basis for saying it's \$15?

23 I looked at the website, or my law clerk more
24 accurately looked at the website, and it says that a
25 thirty-day supply of the generic version without insurance

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1 costs \$15.31 --

2 MS. BONJEAN: Correct.

3 THE COURT: -- to \$60, depending on which pharmacy
4 you visit. Is that wrong?

5 MS. BONJEAN: No. Well, the -- the same website
6 that the Government used demonstrates that the -- I mean
7 again, obviously, these are -- I think these websites kind of
8 give you an estimate of some type, but I didn't pull 15.31
9 from thin air. That was what they indicated was for uninsured
10 people, \$15.31 for a thirty-day supply of valacyclovir, which
11 is, again, just the generic version.

12 I don't know -- I put the cite there. I don't know
13 if it didn't come up, but I could certainly Google it right
14 now.

15 THE COURT: Well, I don't think it's necessary. I
16 just wanted to make sure I understood what the source of
17 the --

18 MS. BONJEAN: The same source as the Government's
19 \$421.29.

20 THE COURT: Okay.

21 Do you have any response you want to make to that in
22 terms of using a generic versus a non-generic drug?

23 MS. ELBERT: I would just observe that the
24 requirement is that the amount be a reasonable estimate, and
25 that the requirement is that restitution reimburse victims for

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1 the full amount of their losses.

2 And we submit that the data relating to the
3 out-of-pocket costs for Valtrex is a reasonable estimate. As
4 your colloquy with defense counsel just pointed out, these
5 prices can vary depending on geographic location and over
6 time.

7 We submitted a receipt from the victim known as
8 Stephanie, who has insurance. Her co-pay was more than \$15.

9 There is some variation in how much it is truly
10 going to cost. And given that the requirement is for
11 restitution to cover the full amount of the victim's losses,
12 we think using a conservative estimate of the brand name drug
13 would be reasonable under the circumstances.

14 THE COURT: And your range, I think, was \$35, 35.74?

15 MS. ELBERT: That's the -- I think that's the co-pay
16 that Stephanie had to pay, that's right.

17 THE COURT: All right.

18 The other question was this issue of reimbursement
19 for annual gynecological exams.

20 Is there anything more you want to say about that?

21 MS. BONJEAN: No, Your Honor.

22 THE COURT: All right.

23 I, again, keeping in mind that the defendant is
24 required to compensate the victim for the full amount of her
25 losses and given the variation in what these drugs can cost, I

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1 think the Government's estimate is reasonable and supported,
2 and they have met their burden.

3 That also goes for the annual gynecological visits.
4 That is a cost that is reasonably projected into the future,
5 and it is a reasonable foreseeable offense of being infected
6 with this disease.

7 Now, the next question is therapy. And the
8 Government calculates that amount by assuming that Jane is
9 going to require therapy for three-and-three-quarters years at
10 a cost of a hundred-dollars per session. And as I understand
11 it, the three-and-three-quarters years number represents the
12 period of the victimization.

13 Is that correct?

14 MS. ELBERT: That's right, Your Honor.

15 THE COURT: All right. Is there anything that
16 anybody wants to say in addition to what you've already said
17 in your papers?

18 MS. BONJEAN: No, but as to Jane, I'm just trying to
19 make sure I understand.

20 So, despite the fact that valacyclovir, at least
21 according to Drugs.com, has an estimated thirty-day supply
22 cost of \$15.31, and according to the Government's reliance on
23 that same website that Valtrex has a monthly cost of \$421.29,
24 the 421 is -- we are going to assume that that's the
25 reasonable estimate?

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1 THE COURT: First of all, I think you might be
2 misstating what your website said. I think it said 15 to \$60,
3 at least when we looked at it.

4 MS. BONJEAN: Okay.

5 THE COURT: But I think the Government, the request
6 that the Government has made is a reasonable request. And I
7 understand you have an exception to it.

8 MS. BONJEAN: I'm not -- I'm not -- I do have an
9 exception to it, but I'm just trying to get clarity that,
10 let's just say that the website says 15 to \$60 for
11 valacyclovir, the Court is determining that the \$421 for
12 Valtrex is a reasonable estimation?

13 THE COURT: I am determining that the Government's
14 estimate, which was a \$35.74 figure -- do I have that right?

15 MS. BONJEAN: No, Judge, you do not.

16 THE COURT: I wasn't asking you, I was asking the
17 Government.

18 MS. ELBERT: That is the amount that Stephanie had
19 to pay for her co-pay with insurance.

20 THE COURT: Oh, I see.

21 MS. ELBERT: We're seeking restitution in the amount
22 for the out-of-pocket expense as to Jane because she is
23 uninsured.

24 THE COURT: Okay. So, I think it is reasonable, as
25 the Government points out, given the fluctuations in cost to

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1 allow her restitution for the non-generic version of the drug.
2 Nobody has cited anything to say that the defendant can
3 dictate the kind of medicine t -- hat the victim takes.

4 And so, I understand you disagree with me, and you
5 can appeal.

6 MS. BONJEAN: Yeah, I intend to.

7 But my question is, are you -- I'm just trying to
8 get clarity because you said both the \$35 and --

9 THE COURT: Well, I was mistaken.

10 MS. BONJEAN: Yeah, okay, I'm just trying to get
11 clarity.

12 Whenever the Court's ready, I just wanted to make
13 sure I understand.

14 THE COURT: Well, just take it easy on the court
15 reporter, if you could.

16 MS. BONJEAN: My apologies.

17 THE COURT: I think I made myself clear in terms of
18 what the total amount was, and so that the herpes treatment
19 expenses, the total amount is \$357,218.18. And that total
20 amount includes herpes, the projected therapy expenses for
21 three-and-three-quarter years. And I haven't gotten to the
22 question of lost income yet.

23 MS. BONJEAN: May I just, Your Honor?

24 So, I -- and, again, I'm just going back to, and
25 that was premised on the \$421 that the Government estimated,

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1 is that correct?

2 THE COURT: Yes, that's correct.

3 MS. BONJEAN: Okay.

4 THE COURT: Now, with respect to -- I also find that
5 she is entitled to therapy given the testimony at the trial.

6 And I know you disagree with the evidence at the
7 trial, Ms. Bonjean, but accepting the jury's verdict, there is
8 more than enough evidence that that could cause life-long
9 trauma. And the Government's only asking for
10 three-and-three-quarter years. The hundred-dollar per therapy
11 session is reasonable.

12 I know that you took issue with that number because
13 somebody else paid \$75,000. I think this is a reasonable
14 amount, and so your objection on that is overruled.

15 The question of lost income, the Court may require
16 restitution for lost income if an offense resulted in bodily
17 injury to a victim, but that cannot be based on speculation.

18 I think the Government's theory is that the forced
19 labor conduct, which is the subject of Racketeering Act 11,
20 caused bodily injury.

21 But I don't think the Government has met its burden
22 in showing that the defendant caused her to be unemployed by
23 three-and-three-quarters years. So I think that's too
24 speculative, I am not going to include that in a restitution
25 award.

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1 Is there anything anybody else wanted to say about
2 that?

3 MS. ELBERT: No, Your Honor.

4 MS. BONJEAN: No, Your Honor.

5 THE COURT: All right.

6 Moving on to Stephanie. The Government seeks two
7 categories of restitution for her: Past and future expenses
8 for her herpes treatment totaling \$70,581.72; and past therapy
9 totaling \$8,400.

10 This falls under 18 U.S.C. Section 3663 since
11 Stephanie is not a Mann Act victim. I think some of the
12 arguments are similar with respect to the propriety of
13 ordering restitution to Stephanie for both of these. Let me
14 just make sure I'm right. Well, with respect to the herpes,
15 certainly.

16 Is there anything additional that you want to say
17 about that, Ms. Bonjean, just with respect to that one item?

18 MS. BONJEAN: Yes, just briefly.

19 I think the arguments are similar, but particularly
20 as to Stephanie, I think that there is -- and I think the
21 record is devoid, frankly, of any evidence that there is a
22 causal link between the charged offense or any criminal
23 activity that was allegedly part of the RICO enterprise that
24 can be linked to her -- her herpes diagnosis. And that is
25 also bolstered by the fact that the defendant, himself, wasn't

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1 diagnosed with herpes until spring of 2000.

2 THE COURT: Was he diagnosed then or just treated
3 then?

4 MS. BONJEAN: No, he was diagnosed. But even
5 according to the medical records, he started presenting in
6 2000 with certain types of symptoms that was then being
7 treated, and then formally diagnosed, I think, in April of
8 2000.

9 There is just nothing in the medical records that
10 suggests that he was suffering from herpes prior to 2000. I
11 think there were some other medical entries that suggested
12 other -- he was diagnosed, I think, with a different STI at
13 some point, but that's -- that's my recollection of the
14 record.

15 And we also have no testimony from Stephanie,
16 herself. The Government wasn't shy about eliciting testimony
17 from witnesses who had alleged that they had been afflicted
18 with herpes during the course of the relationship with
19 Mr. Kelly.

20 So, the absence of that in her testimony, I think,
21 is, again, corroborative of -- and would suggest that there is
22 just insufficient evidence to make a correlation that he was
23 responsible for that.

24 And we're not talking about a disease that is very
25 rare. I've cited it over and over, and I think we're doing a

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1 lot of stigmatization of herpes -- people who have herpes, but
2 one in six people have herpes. So, it is not outside the
3 realm of possibility that this woman did not get herpes from
4 Mr. -- Mr. Kelly. And the evidence just isn't there to
5 support it.

6 So -- and it certainly can't be correlated to
7 Racketeering Act 2, and there is just a dearth of evidence to
8 make the necessary causal link from our standpoint.

9 I know I just want for the record to be clear. I
10 was a little confused by the Government's letter on
11 September 27th, the footnote which said 2009. I kind of
12 assumed it meant 2000 because the 9 and the zero are next to
13 each other, but it sounds like what they meant to say was
14 1999.

15 Again, I was hypothesizing at that point because I
16 didn't have clarity on what they really meant by that. But in
17 any event, the analysis is the same from my perspective.
18 There isn't the sufficient correlation to the charged offenses
19 or any criminal activity charged in the racketeering
20 enterprise.

21 And then we also have, unlike in -- unlike in Jane's
22 situation, a fair amount of evidence that was received that
23 would contradict any claim that she actually did contract
24 herpes from Mr. Kelly.

25 So, that's what I would add to the argument, Your

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1 Honor.

2 THE COURT: Government want to be heard?

3 MS. ELBERT: Your Honor, Stephanie had informed the
4 Government, and this is in the 3500 item that we cite in our
5 letter, that she had this sexual relationship with Mr. Kelly
6 and that after a couple of months she began to have symptoms,
7 was diagnosed. And she specifically stated that she was
8 17 years old at the time of her diagnosis, which would put it
9 at 1999.

10 Given the correlation in time and the nature of her
11 relationship with Mr. Kelly and it falling within the scope of
12 the charged criminal conduct, the Government would then submit
13 that by a preponderance of the evidence, the cost of
14 Stephanie's herpes treatment is fairly attributable to the
15 defendant's criminal conduct and should fall within the scope
16 a restitution order.

17 THE COURT: Okay, what is your position as to
18 Ms. Bonjean's point about that he wasn't -- I don't know when
19 he was diagnosed versus when he was treated?

20 MS. ELBERT: Yes, Your Honor.

21 As we point out in our papers, herpes infections are
22 often asymptomatic. So, it's not necessarily conclusive that
23 the fact that the defendant began to be treated for herpes
24 post-dated his relationship with Stephanie, doesn't
25 conclusively establish that he did not infect her with herpes.

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1 And so, given, again, the correlation in time, the
2 fact that, per the victim, Mr. Kelly was her only partner
3 during this period in her life, and the standard of
4 preponderance, we think it's -- the evidence makes it
5 reasonable to conclude that these costs were the result of
6 Mr. Kelly's conduct.

7 THE COURT: Counsel also points out that she didn't
8 testify about it at the trial.

9 Do you have a response to that?

10 MS. ELBERT: I don't believe she was asked about it,
11 so it's not as though she testified to the contrary.

12 And she did prior to trial during an interview in
13 2019 state that she believed she had contracted herpes from
14 Mr. Kelly.

15 THE COURT: All right, anything else you want to say
16 about that, Ms. Bonjean?

17 MS. BONJEAN: Only to highlight, Your Honor, I think
18 the Government is now saying, well, he could have been
19 asymptomatic.

20 I mean it is such conjecture, and we are looking
21 back at an event from twenty years ago. So -- and I think it
22 should require more than what the Government has established
23 to make the causal link.

24 They're not only not making a causal link to the
25 specific offense conduct, which they can't do, but they are

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1 not even making a link to, you know, that it happened in --
2 and that Mr. -- Mr. Kelly was responsible for that.

3 I mean, again, I think, you know, the record speaks
4 for itself on that. I don't think we can just assume he was
5 asymptomatic. Which, by the way, I think their own expert
6 indicated that in initial outbreak you're not asymptomatic.
7 You know when you first get it, that's why you go to the
8 doctor and that's how you get diagnosed. It isn't like, you
9 know, a nagging thing that you don't, you know, notice. I
10 think that's contrary to what their own expert testified to.

11 THE COURT: Well, the expert's testimony was pretty
12 broad on the ways in which herpes can be treated, including
13 when people are not symptomatic. So, I don't think that the
14 expert's testimony supports the position that he did not
15 transmit it.

16 And my recollection is also that he was treated for
17 it sometime after the relationship with Stephanie, but being
18 treated for it doesn't mean that he didn't have it before.

19 I find that the Government has shown by a
20 preponderance of the evidence that Stephanie's entitled to
21 restitution for treatment for herpes. The circumstantial
22 evidence, which was she first had sex with the defendant when
23 she was 17 years old in 1999 and had a relationship that
24 lasted for six months. There is support for that in the 3500
25 material, that he was her only partner, and that she was

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1 diagnosed with herpes a few months after she got symptoms.

2 And so, I find that that satisfies the Government's
3 burden that she contracted it during the conduct that formed
4 the basis for Racketeering Act 2, but the overall purposes of
5 the racketeering enterprise, including the means and methods,
6 included precisely this kind of conduct.

7 There is a question that I have for the Government.
8 That exhibit that you submitted suggests that Stephanie is
9 taking the generic version. I don't know what your evidence
10 is, is what she took from 1999 to 2015, but if she's taking
11 the generic version, I do think your calculations should be
12 adjusted.

13 MS. ELBERT: Certainly, Your Honor.

14 For the period during which she's had insurance, I
15 believe the calculation reflects the actual cost submitted in
16 the exhibit.

17 I don't know that we have information historically
18 as to what version of the drug she was taking in the years
19 prior to her obtaining insurance. But if the Court -- I also
20 don't know at what point the generic version of Valtrex became
21 available on the market, since we're going back quite a long
22 time. So, I may want to look into that, but --

23 THE COURT: I think you are going to have to revisit
24 your calculations on that.

25 MS. ELBERT: Understood.

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1 THE COURT: Then there is the question of therapy.
2 The request is for \$8,200 to cover past therapy costs. And I
3 think I understand the parties' relevant positions.

4 Is there something that you want to add to that,
5 Ms. Bonjean?

6 MS. BONJEAN: No, Your Honor.

7 THE COURT: All right, anything else that the
8 Government wants to say?

9 MS. ELBERT: No, Your Honor.

10 THE COURT: All right.

11 I find that those costs, \$8,200, are reasonable and
12 supported by the evidence. It is true that this relationship
13 was, I guess, relatively short, but the trial evidence was
14 that Stephanie was 17 at the time and that she testified that
15 she suffered and continues to suffer as a result of the nature
16 of that relationship, which included demeaning and degrading
17 conduct.

18 So, I find that she is entitled to compensation for
19 therapy that she went through to deal with that trauma. And
20 so, that's a reasonable amount.

21 Now, the next question is Sonja. The Government is
22 seeking \$5,200 in future expenses. Of course, the difference
23 here is that the jury found racketeering acts involving Sonja
24 were not proven. Those were Racketeering Acts 3 and 4.

25 I mean the rule is that restitution can be given

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1 even if there is an uncharged or acquitted count.

2 But does anyone have anything else they want to say
3 on this subject?

4 MS. ELBERT: No, Your Honor.

5 MS. BONJEAN: Your Honor, our position is, of
6 course, that even apart from the fact that he was acquitted of
7 the conduct, there just was -- is insufficient evidence to
8 support what exactly Sonja is seeking restitution for and in
9 connection to what offense. Again, for which Mr. Kelly has
10 not been convicted.

11 And, of course, our position is the Government's,
12 you know, assertion that they still proved it by a
13 preponderance of the evidence is just that. We don't have any
14 type of indication from the jury that it was proved by a
15 preponderance of the evidence, even that low standard.

16 So, I have nothing more to add.

17 THE COURT: I agree with the defense on this one.
18 There is no way to determine, although I'm not sure it's
19 required, why the jury found that these facts were not proved,
20 but they did.

21 And I find that under these circumstances the
22 Government has not met its burden in establishing that these
23 acts are covered by the statute. And so, I am denying
24 restitution as to Sonja.

25 The next question, and I think I am going to need

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1 further submissions on this, at least unless the Government or
2 the defense has something else to say about it, because in
3 determining a schedule of payment, one thing I have to
4 consider is Mr. Kelly's resources, which continues in my mind
5 to be a sort of murky area.

6 I know when we discussed this at sentencing, it was
7 the defense position that he was indigent or nearly indigent,
8 at least with respect to the information that you had at the
9 time. And since then, it emerged that he had this
10 approximately \$28,000 in his commissary account.

11 The Government also represented at sentence that
12 there is a separate, I forget what it's called, but a separate
13 copyright that gives him access to additional money, but
14 nobody has really given me any clarity on this.

15 And so, on the question of scheduling, it's
16 difficult for me to determine how to set that schedule up
17 because, for example, I don't know if you know, I don't know
18 what the source of the \$28,000 was.

19 MS. BONJEAN: I do know.

20 THE COURT: Okay.

21 MS. BONJEAN: Fans --

22 THE COURT: Okay.

23 MS. BONJEAN: -- that were making deposits into his
24 commissary account. So -- which they will not do anymore, of
25 course. So, that's where that money was coming from. They

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1 were people making, you know, a hundred dollars here, a
2 hundred dollars there. I don't really know. I don't have the
3 specific data of that, but that was not from any source of
4 income to the best of my knowledge or anything related to
5 Mr. Kelly's royalties or anything related to that.

6 Our position remains the same, or at least my
7 understanding is to the royalties, as I said at sentencing, it
8 is not that his -- that he does not have money generated as a
9 result of his body of work, he just has no access to it
10 because there are judgments against it.

11 THE COURT: My recollection, and I'm sorry to
12 interrupt you, I just want to make sure that I don't forget.
13 I thought, the way I understood it, and I'm sure you all know
14 far more about this than I do, but that the royalties with
15 Sony were subject to some civil judgments.

16 MS. BONJEAN: Two, correct.

17 THE COURT: And then do you have any more insight
18 into the separate, I think it was \$5 million that he might
19 have access to?

20 MS. BONJEAN: I mean the Government has made that
21 claim. I -- I have not been able to verify that. And I'm
22 not -- I would be happy to look at any documents that the
23 Government wants to provide me.

24 Mr. Kelly has never in the history of his career
25 been, I would say, apprised really or even knowledgeable about

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1 how his business deals work.

2 There's, again -- and that -- that -- that evidence
3 was presented in great detail at the Chicago case, but I will
4 represent that to the Court here, he is functionally
5 illiterate. That was always deferred to managers. So, he is
6 not the best source of that information.

7 If the Government with its subpoena power, which I
8 think it has exercised in a number of ways, has the ability to
9 clarify this for me, I will be happy to do my best to inquire
10 further to the extent I can, but I think they're actually in a
11 better position than me.

12 But I am -- I am -- I am unaware of this other pot
13 of money that the Government has referenced.

14 THE COURT: What would you like to say about this?

15 MS. ELBERT: I'll need to look into it further, Your
16 Honor, and would be happy to submit an additional letter on
17 the subject of a schedule for payment.

18 THE COURT: And you are also going to have to submit
19 an order, a restitution order --

20 MS. ELBERT: Correct, Your Honor.

21 THE COURT: -- for me. And keeping in mind that I
22 know some of it is probably going to be, I don't know how you
23 want to handle this sealed, not sealed portion, but I think
24 there's a method for doing that.

25 MS. ELBERT: Yes, Your Honor.

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1 THE COURT: Hold on for just a minute. Let me just
2 make sure I haven't missed anything.

3 MS. BONJEAN: If there's a way for the restitution
4 order to trump the default judgments, I'd be happy to sign
5 onto that so that that money can go towards the restitution
6 payments.

7 THE COURT: Well, my understanding, and you will
8 correct me if I'm wrong, I think under the statute -- well, I
9 think doesn't the defense have the responsibility of showing
10 what the defendant's financial condition is?

11 I am not saying -- if you can't do it, you can't do
12 it.

13 MS. BONJEAN: I mean, you know, we did do a -- a
14 affidavit of his financial status as part of -- with
15 Probation.

16 THE COURT: Right.

17 MS. BONJEAN: Again, I -- I don't think I can really
18 reiterate as best -- I mean I can continue to reiterate it.
19 It's just a little more challenging than it seems like it
20 should be, but --

21 THE COURT: I think I understand your position.
22 It's just a slightly unusual situation. So --

23 MS. BONJEAN: Yes, and part of this is because Sony
24 doesn't cooperate with me. They cooperate with the
25 Government. I can't call Sony up and get that information.

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1 They'll give it to the Government, but they won't give it to
2 me.

3 Now, maybe that's not how it should be. I think
4 it's probably not, but that is just how it is.

5 THE COURT: Do you have anything else you want to
6 say about that?

7 MS. ELBERT: No, Your Honor.

8 THE COURT: All right. Hold on, I just want to
9 double-check here.

10 (Pause.)

11 THE COURT: I will also confess that math is not my
12 strong suit, but ordinarily I would give you the breakdown,
13 but I think you've got some recalculation to do. And I
14 haven't determined a schedule just because the Government is
15 asking for some additional time for that.

16 So, I can tell you the amounts with respect to Jane
17 that the total amount is, and I believe this is right,
18 \$300,668.18. But you are going to recalculate the medication
19 costs for Stephanie, and there is \$8,400 in therapy.

20 The other thing to keep in mind, just in terms of
21 schedule of payments, I set a schedule based on the fines,
22 which is the typical, I think it's \$25 a quarter and then
23 10 percent upon release of gross monthly income. I think
24 that's right. That was set, in part, because we hadn't
25 decided the restitution.

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1 The other issue is that the \$900 mandatory
2 assessment has to be paid first, I think. Then the
3 restitution, and then the fines. And there is also the
4 \$40,000 amount, and I don't remember what order that comes in.

5 And just so I think I'm right, no payments have been
6 made at all yet, is that right?

7 MS. BONJEAN: I don't believe so, Judge.

8 I just want -- no, the answer to your question is --

9 THE COURT: I know you've had a few other things
10 going on.

11 MS. BONJEAN: Just a few.

12 I don't believe there has been. Mr. Kelly's been
13 pretty occupied, too, for the last five weeks.

14 But, I just -- the Court mentioned something, and I
15 wanted to make sure I wasn't missing something in your prior
16 order about the schedule of payments. I did see the order
17 saying that a lump-sum payment of \$900 was due immediately.

18 THE COURT: Right.

19 MS. BONJEAN: I didn't see the reference to the --
20 the schedule of payments in the order.

21 THE COURT: It's not in the order, it's at the end
22 of the sentencing.

23 Did I not put it in the order? I'm pretty sure we
24 did.

25 Did we not put the schedule in?

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1 I'm not sure that it has to be in the order
2 actually, but --

3 THE COURTROOM DEPUTY: I'm not sure either, Judge.

4 MS. BONJEAN: It may not be, I just would like to
5 know what the Court said so I can write it down.

6 THE COURT: It's also in the minutes of the
7 sentencing at the end. I just have the rough copy.

8 MS. BONJEAN: Was it?

9 THE COURT: Then the other little wrinkle, which
10 occurs to me, is this question of the money from Mr. Kelly's
11 commissary account, which I think you've appealed that.

12 Is that an appealable order?

13 MS. BONJEAN: I believe so. The Second Circuit, I
14 think, joined it with the appeal from the substantive case.

15 THE COURT: Right. I think you're right.

16 So, the only thing I was saying was that the reason
17 that was seized was to cover what his obligations are.

18 So, that's going to be a source of, at least, some
19 of the restitution. And I don't know which, the other thing
20 you are going to have to let me know is, I think because it's
21 mandatory, that the restitution for Jane would come first.

22 MS. BONJEAN: That's my understanding of the law.

23 THE COURT: So, all right, what's the timeline here
24 for your submissions?

25 MS. ELBERT: Could I have a week, Your Honor?

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1 THE COURT: Sure.

2 Do you have any additional submissions you want to
3 make or do you want to see what they say first?

4 MS. BONJEAN: I don't want to promise I won't have
5 any additional submissions.

6 THE COURT: I'm sure you will. It's perfectly fine.
7 I mean if you want to have another week after that.

8 MS. BONJEAN: Thank you, Your Honor, yes, just so I
9 can take a look.

10 THE COURT: Okay.

11 MS. BONJEAN: And I'll try to do some more due
12 diligence looking into the questions the Court raised about
13 his income.

14 THE COURT: Okay, thanks so much.

15 Anything else anybody wants to put on the record?

16 MS. ELBERT: Not for the Government, Your Honor.

17 MS. BONJEAN: No thank you, Your Honor.

18 THE COURT: Mr. Kelly, you heard all of that, right?

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: Okay.

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: All right, everybody, thank you so much.

23 (Matter adjourned.)

24 (Judge ANN M. DONNELLY exited the courtroom.)

25

SAM OCR CRR RMR RPR